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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Jowell Finley,

Plaintiff,

v.

A. De La Trinidad et al.,

Defendants.

Case No. 11cv2318 JLS (PCL)

**REPORT AND
RECOMMENDATION
GRANTING DEFENDANTS'
MOTION TO DISMISS**

(Doc. 8.)

INTRODUCTION

Plaintiff Jowell Finley, a prisoner proceeding *pro se*, filed a Complaint against Defendants Officer De La Trinidad, Officer Diaz, Sergeant Martinson, Captain Paul, Sergeant Romo, Lieutenant Willis, Lieutenant Romero, and Warden Uribe claiming that Defendants retaliated against him for filing inmate grievances against prison staff by placing him in the Administrative Segregation Unit (ASU) at Centinela State Prison. (Doc. 1, at 13-14.) Plaintiff also claims that Defendant De La Trinidad assaulted him on the way to a staff complaint interview, while Defendant Romero watched but did nothing to stop it and failed to report it. (Doc. 1-1, at 13-14.) Plaintiff further claims that Defendants Diaz, Gonzalez and Chavez were negligent when they lost or damaged his personal property while he was in the ASU. (Doc. 1, at 13-14.)

Defendants filed a Motion to Dismiss Plaintiff's negligence claims for lost or damaged personal property against Defendants Diaz, Gonzalez, and Chavez because he failed to exhaust

his administrative remedies first. (Doc. 8.) Plaintiff filed a statement of nonopposition to Defendants' motion. (Doc. 10.) Upon reviewing the Complaint, Defendants' Motion and Plaintiff's Statement of Nonopposition, the Court recommends Defendants' Motion to Dismiss be GRANTED.

DISCUSSION

A. Legal Standard

The Prison Litigation Reform Act of 1995 (PLRA) amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). Even when a prisoner seeks relief not available in grievance proceedings, notably monetary damages, exhaustion is a prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a prerequisite for all prisoner suits regarding the conditions of their confinement, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.^{1/}

The PLRA requires proper exhaustion of administrative remedies. Woodford v. Ngo, 548 U.S. 81, 83 (2006). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Id. at 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to properly exhaust. Id. The PLRA's exhaustion requirement cannot be satisfied "by filing an untimely or otherwise procedurally defective administrative grievance or appeal." Woodford, 548 U.S. at 84. "The level of detail necessary in a grievance to comply with the grievance procedures will vary from

1. These remedies need not meet federal standards, nor must they be "plain, speedy and effective." Porter, 534 U.S. at 524 (citations omitted); Booth, 532 at 739-40 & n.5 (2001). The obligation to exhaust persists as long as some remedy is available; when that is no longer the case, the prisoner need not further pursue the grievance. Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005).

1 system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that
 2 define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007).

3 The State of California provides its prisoners the right to appeal administratively "any
 4 departmental decision, action, condition or policy perceived by those individuals as adversely
 5 affecting their welfare." CAL. CODE REGS. TIT. 15, § 3084.1(a). It also provides them the right to
 6 file appeals alleging misconduct by correctional officers and officials. Id. § 3084.1(e). In order to
 7 exhaust available administrative remedies within this system, a prisoner must proceed through
 8 several levels of appeal: (1) informal resolution, (2) formal written appeal on a 602 inmate
 9 appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal
 10 to the Director of the California Department of Corrections and Rehabilitation. Barry v. Ratelle,
 11 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing CAL. CODE REGS. TIT. 15, § 3084.5). A final
 12 decision from the Director's level of review satisfies the exhaustion requirement under §
 13 1997e(a). Id. at 1237-38.

14 Lastly, non-exhaustion under § 1997e(a) is an affirmative defense which should be
 15 brought by defendants in an unenumerated motion to dismiss under Federal Rule of Civil
 16 Procedure 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). A complaint may be
 17 dismissed by the court for failure to exhaust if a prisoner "conce[des] to nonexhaustion" and "no
 18 exception to exhaustion applies." Id. at 1120. A dismissal for failure to exhaust administrative
 19 remedies is without prejudice. Wyatt, 315 F.3d at 1120.

20 **B. Analysis**

21 Defendants argue Plaintiff did not properly exhaust his administrative remedies with
 22 regard to his negligence claims for personal property prior to the filing of this complaint as
 23 mandated by § 1997e(a). (Doc. 8.) Specifically, Defendants put forth evidence of Plaintiff's
 24 attempted appeal to the Office of Third Level Appeals that was screened out because it did not
 25 comply with the requirements relating to appeals. (See Foston Decl., Doc. 8-1, at 1-24.) This
 26 appeal regarding his negligence claims against Defendants Diaz, Gonzalez, and Chavez was not
 27 pursued further by Plaintiff to the Director's level of review as required under the regulations.
 28 (Id.) As such, Defendants argue that Plaintiff's negligence claim against Defendant Diaz should

1 be dismissed and that Defendants Gonzalez and Chavez should be dismissed from the case as
2 Plaintiff makes no other claims against them. (Doc. 8, at 7-8.)

3 In this case, Plaintiff filed a notice of intent of nonopposition to Defendant's motion to
4 dismiss Plaintiff's negligence claims against Defendants Diaz, Gonzalez, and Chavez. (Doc. 12.)
5 As Defendants have put forth evidence that Plaintiff failed to exhaust his administrative
6 remedies regarding the negligence claims and Plaintiff has not put forth any evidence refuting
7 Defendants' position, the Court recommends that Plaintiff's negligence claim against Defendant
8 Diaz should be dismissed and that Defendants Gonzalez and Chavez should be dismissed from
9 the case as Plaintiff makes no other claims against them.

10 **CONCLUSION**

11 For the reasons set forth above, the Court recommends Defendants' Motion to Dismiss
12 Plaintiff's negligence claims be **GRANTED**. The Court recommends that Plaintiff's negligence
13 claim against Defendant Diaz should be dismissed without prejudice. The Court recommends
14 that Defendants Gonzalez and Chavez should be dismissed without prejudice from the case.

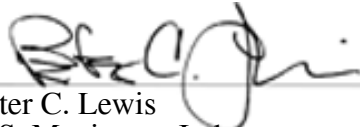
15 This Report and Recommendation is submitted to United States District Judge Janis
16 Sammartino, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States
17 District Court for the Southern District of California.

18 Any written objections to this Report and Recommendation must be filed with the Court
19 and a copy served on all parties on or before **March 30, 2012**. The document should be
20 captioned "Objections to Report and Recommendation."

21 Any reply to the objections shall be served and filed on or before **April 9, 2012**. The
22 parties are advised that failure to file objections within the specified time may waive the right to
23 raise those objections on appeal of this Court's order. Martinez v. Ylst, 951 F.2d 1153, 1156
24 (9th Cir. 1991).

25 **IT IS SO ORDERED.**

26 DATE: March 21, 2012

27 
Peter C. Lewis
U.S. Magistrate Judge
United States District Court